No. 17-340

IN THE

Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF BY EMPLOYMENT LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

John G. Albanese
BERGER & MONTAGUE, P.C.
43 SE Main Street
Suite 505
Minneapolis, MN 55414
(612) 594–5997
jalbanese@bm.net

Anna P. Prakash
Counsel of Record
NICHOLS KASTER, PLLP
4600 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 256–3200
aprakash@nka.com

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INTEREST OF THE AMICI CURIAE

Amici are 35 law professors who have taught and written about employment law.[1] They are listed in the Appendix to the brief. They submit this brief because they believe that the Federal Arbitration Act ("FAA") should be construed consistent with how all other statutes and related case law treat issues of worker status. Amici take no position on other issues raised in the underlying proceedings or that might be addressed on remand from this Court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner New Prime, Inc. ("Prime") and its amici ask this Court to interpret "contracts of employment" as used in the FAA based solely on the labels used in particular contracts, drawing distinctions between independent contractors and employees where there is no sound basis to do so. There are many statutes and regulations that do not divide workers based on the common law concepts of employees and independent contractors. For those statutes that do draw such lines, the

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored its amici brief in whole or in part and no person or entity, other than amici or their counsel, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), amici state that counsel of record for each party has consented to the filing of this brief.

The law professors are signing this brief in their personal capacity and not on behalf of their institutions.

determination of whether a worker is an employee or independent contractor is based on the facts of the working relationship and not simply on whatever labels are used by the parties in a contract. No statute is interpreted in the superficial, form-over-substance way that Prime advocates. Adopting this approach would lead to absurd and pernicious consequences.

That the FAA uses the phrase "contracts of employment of . . . any other class of workers engaged in foreign or interstate commerce" is not in itself proof that Congress intended to import the common law employee/independent contractor distinction to define the scope of FAA coverage. 9 U.S.C. § 1. The First Circuit correctly concluded that the FAA does not draw lines between employees and independent contractors, finding that such a distinction would be a "strange one for Congress to draw" because both independent contractors and employees in the transportation industry perform the same role in the "free flow of goods" that animated the transportation worker exemption under the FAA. The First Circuit's analysis of the FAA is consistent with a number of statutory and regulatory regimes that do not distinguish between independent contractors and employees. Notably, due to abuses in classifying commercial truckers as independent contractors, laws regulating the commercial trucking industry do not distinguish between employees and independent contractors.

Even when statutes call for a distinction between employees and independent contractors, courts do not draw that distinction by simply viewing the face of a contract. Rather, courts determine worker status under federal employment

statutes by examining all relevant aspects of the working relationship. This longstanding approach further supports the conclusion that the FAA's exemption applies regardless of worker status. That is, determining worker status requires a review of the totality of the circumstances, an inquiry that requires discovery beyond the face of a contract. Should this Court hold that the FAA's transportation worker exemption depends on the worker's status as either an independent contractor or employee, the Court must not allow the distinction to be determined by contract.

Allowing worker status to be decided by contract would set the FAA apart from every other federal statute governing workers. It would lead to inconsistency and uncertainty in the workplace because worker status would vary based on contract or the label chosen for each worker. It would allow companies to unilaterally decide whether their workers are protected by the law. The danger in such an approach is particularly real in the context of the underlying wage statute in this case, the Fair Labor Standards Act ("FLSA"), which was designed to prevent parties from contracting away employees' rights to minimum wages and overtime compensation. This Court must not, through the FAA, endorse this type of race to the bottom.

ARGUMENT

I. Many Federal and State Statutory Schemes Do Not Distinguish Between Common Law Employees and Independent Contractors.

The First Circuit held that the FAA does not draw lines based on common law conceptions of

employees and independent contractors, finding that Congress, through the FAA's exemption for transportation workers,[2] "'demonstrated concern with transportation workers and their necessary role in the free flow of goods' at the time when it enacted the FAA." *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 22 (1st Cir. 2017) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001)). The court concluded that a "distinction . . . based on the precise employment status of the transportation worker would have been a strange one for Congress to draw: Both individuals who are independent contractors performing transportation work and employees performing that same work play the same necessary role in the free flow of goods." *Id.* at 22.

Employment statutes and regulations cover a diverse array of work-related activities, and each statute or regulation needs to be considered within the context in which it was enacted. Given the background of the FAA, the First Circuit's interpretation that the FAA does not differentiate between common law employees and independent contractors is far from unusual.

Significantly, laws and regulations governing the commercial trucking industry often do not delineate between employees and independent contractors. *See, e.g.*, 49 C.F.R. § 390.5T (defining "employee" to include "a driver of a commercial motor vehicle (including an independent contractor

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[2] The exemption provides "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler"); 49 U.S.C. § 31101(2) (defining "employee" in Commercial Motor Vehicle Safety Act as "a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle"); Neb. Rev. Stat. Ann. § 75-362(12) (stating similar); S.C. Code Ann. Regs. 38-390.5 (stating similar); Ill. Admin. Code tit. 92, § 390.1020 (stating similar); 4 Colo. Code Regs. § 723-6:6001 ("'Driver' means any person driving a motor vehicle, including an independent contractor").

The reason that these laws do not differentiate between employees and independent contractors is because "[m]otor carriers had attempted to immunize themselves from the negligence of the drivers who operated their vehicles by making them all nominally 'independent contractors.'" *White v. Excalibur Ins. Co.*, 599 F.2d 50, 52 (5th Cir. 1979). "In order to protect the public from the tortious conduct of the often judgment-proof truck-lessor operators, Congress . . . require[d] interstate motor carriers to assume full direction and control of the vehicles that they leased as if they were the owners of such vehicles." *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 38 (Tex. App. 2002) (internal quotation marks omitted); *see also Perry v. Harco Nat. Ins. Co.*, 129 F.3d 1072, 1074 (9th Cir. 1997) ("[O]ne purpose [of the Motor Carrier Safety Act] is to protect members of the public from motor carriers' attempts to escape liability for the negligence of drivers by claiming their drivers were independent contractors."). Thus, in federal and state statutes and regulations governing commercial trucking, there is no meaningful

distinction between independent contractors and common law employees.

Provisions regulating the trucking industry are not the only laws that do not distinguish between common law employees and independent contractors. For instance, the Department of Energy's ("DOE") regulations regarding its chronic beryllium disease prevention program define the term "worker" to mean "a person who performs work for or on behalf of DOE, including a DOE employee, an independent contractor, a DOE contractor or subcontractor employee, or any other person who performs work at a DOE facility." 10 C.F.R. § 850.03. Likewise, the Transportation Security Administration's Flight School Security Awareness training regulations enacted after the 9/11 terrorist attack define "flight school employee" as "a flight or ground instructor . . .; a chief instructor . . . .; a director of training . . . .; or any other persons employed by a flight school, including an independent contractor, who has direct contact with a flight school student." 49 C.F.R. § 1552.21.

State statutes as well do not distinguish between contractors and employees where it does not make sense to do so. For example, Minnesota's Drug and Alcohol Testing in the Workplace statute defines "Employee" as "a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for an employer." Minn. Stat. § 181.950, subd. 6. North Dakota has enacted a check fraud statute which renders an employer responsible for fraudulent endorsements of its "employee[s]," which include "an independent contractor and employee of an independent contractor employed by the employer." N.D. Cent.

Code Ann. § 41-03-42(1)(a). There are numerous other examples of state statutes that do not distinguish between employees and independent contractors in varied contexts. *See, e.g.*, Me. Rev. Stat. tit. 24-A, § 2174-A (defining "public works employee" to include "an independent contractor or employee of an independent contractor"); Tenn. Code Ann. § 7-51-1102 (defining an "employee" as "a person who performs any service on the premises of an adult-oriented establishment on a full-time, part-time, or contract basis, whether or not the person is denominated an employee, independent contractor, agent or otherwise, and whether or not such person is paid a salary, wage, or other compensation by the operator of such business" in statute governing adult entertainment); Nev. Rev. Stat. § 33.210 (defining "employee" as "a person who is employed by an employer, including, without limitation, an independent contractor" in statute defining scope of orders for protection involving workplace harassment).

As shown above, not every statutory scheme that regulates employment draws the same lines and distinctions as the common law. That the FAA uses the phrase "contracts of employment of . . . any other class of workers engaged in foreign or interstate commerce" is not in itself proof that Congress intended to import the common law employee/independent contractor distinction to define the scope of FAA coverage.

II. The Reality of the Working Relationship, Not the Face of the Contract, Determines Worker Status Under Federal Employment Statutes.

Should this Court find that the FAA's exemption applies only to employees, employee status cannot be determined by simply looking at the label the employer chose or contract the parties signed. There is no federal law that permits employers to decide for themselves—through contract or label—whether their workers are protected by statute.

It is settled law that the label placed on a working relationship does not define the legal obligations that flow from it. If this were otherwise, businesses could use contracts as "get-out-of-jail-free" cards to avoid most employment laws. And, in the context of an employee seeking a job, businesses could withhold gainful work opportunities unless the applicants submit to "independent contractor agreements." Even in rare situations where applicants have true bargaining power, allowing workers to choose their status would result in inconsistency in the workplace and uncertainty for businesses that want to know their obligations across job categories.

Neither sound policy nor case law permits these results. Rather, when considering worker status under a wide variety of employment laws, courts look beyond labels or contracts and examine the facts of each case. Yet, Prime seeks to make the FAA the exception that overrides established law and sound policy. Under Prime's view, the FAA would be the only statute where contractual labels are dispositive of employment status.

Nationwide Mut. Ins. Co. v. Darden and its progeny illustrate this point. 503 U.S. 318 (1992). In *Darden*, this Court looked to traditional agency law criteria to determine worker status under the Employee Retirement Income Security Act ("ERISA"). *Id.* at 323–24. This Court pointed out the flaws inherent in the Fourth Circuit's approach of examining subjective beliefs to determine worker status, explaining that doing so could lead to different results for workers who are otherwise factually the same. *Id.* at 327 ("Because, for example, Darden failed to make much independent provision for his retirement, he satisfied the 'reliance' prong of the Fourth Circuit's test . . . , whereas a more provident colleague who signed exactly the same contracts, but saved for a rainy day, might not." (internal citations omitted)).

Indeed, allowing each company or worker to choose which label to apply to any given working relationship creates inconsistencies in the protections afforded to workers who perform the same job. It also inhibits companies' abilities to "figure out who their employees are" without inquiring into each worker's chosen or designated status. *Id.* (internal quotation marks omitted). Even in the more likely scenario where companies hold all of the bargaining chips, they should not be allowed to choose a worker's status by simply putting labels in contracts because there would be no guarantee that the labels they chose would reflect the actual realities of the working relationship. Accordingly, in determining worker status under ERISA in *Darden*, this Court adopted

the multi-factor common law agency test[3] and explained that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968) (internal quotation marks omitted)).

Relying on *Darden*, courts acknowledge that multiple factors must be considered to determine worker status under other employment statutes. *See, e.g., Absolute Roofing & Constr., Inc. v. Sec'y of Labor*, 580 F. App'x 357, 361–63 (6th Cir. 2014) (examining *Darden* factors when reviewing worker status determination in Occupational Safety and Health Administration proceeding); *Glascock v. Linn Cty. Emergency Med., PC*, 698 F.3d 695, 698 (8th Cir. 2012) (Title VII of the Civil Rights Act); *Alberty-Vélez v. Corporación de Puerto Rico Para La Difusión Pública*, 361 F.3d 1, 6–11 (1st Cir.

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[3] In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323–34 (quoting *Cmty for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

2004) (same); *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 258–60 (4th Cir. 1997) (same); *Weary v. Cochran*, 377 F.3d 522, 525–28 (6th Cir. 2004) (Age Discrimination in Employment Act ("ADEA")); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90–91 (2d Cir. 1993) ("[T]he corporate form under which a plaintiff does business is not dispositive in a determination of whether an individual is an employee or an independent contractor within the meaning of the ADEA."); *see also Crew One Prods., Inc. v. NLRB*, 811 F.3d 1305, 1309–14 (11th Cir. 2016) (looking at multiple factors relating to common law agency for claims under National Labor Relations Act ("NLRA")); *Alexander v. Avera St. Luke's Hosp.*, 768 F.3d 756, 763–64 (8th Cir. 2014) (applying a hybrid of the common law and economic realities tests under the Family Medical Leave Act); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971) (examining the "factual background of the relationship . . . in order to assess 'the total factual context . . . in light of the pertinent common-law agency principles'" in NLRA case (quoting *United Ins. Co.*, 390 U.S. at 258)).

Likewise, in the context of the Americans with Disabilities Act ("ADA"), this Court has acknowledged that multiple factors focusing on the "common-law touchstone of control" guide the inquiry into worker status. *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 449 (2003).[4] Even under statutes that merely

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[4] We are persuaded by the EEOC's focus on the common-law touchstone of control . . . and specifically by its submission that each of the following six factors is relevant to the inquiry whether a shareholder-director is an employee: Whether the organization can hire or fire the

touch on employment matters, this Court and others have taken a multi-factor approach. *See, e.g.*, *Reid*, 490 U.S. at 751–52 (1989) (examining various factors to determine whether a hired party is an employee under the general common law of agency for the purposes of copyright); *Peno Trucking, Inc. v. Comm'r.*, 296 F. App'x 449, 456 (6th Cir. 2008) (explaining that, for the purposes of FICA taxes, the "usual common law rules applicable in determining the employer-employee relationship" apply and going on to examine multiple factors).

That reality and not contractual labels dictate worker status is all the more significant given that this case was brought under the FLSA. On at least six different occasions over the past seventy years, this Court has unambiguously confirmed that FLSA rights do not cede to contract. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729–30 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the

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> individual or set the rules and regulations of the individual's work[;] Whether and, if so, to what extent the organization supervises the individual's work[;] Whether the individual reports to someone higher in the organization[;] Whether and, if so, to what extent the individual is able to influence the organization[;] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts[;] Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449–50 (quoting EEOC Compliance Manual § 605:0009) (internal citations, quotation marks, and footnotes omitted).

worker from the protection of the Act.") (independent contractor misclassification case); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) ("[T]he purposes of the Act require that it be applied even to those who would decline its protections."); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945); *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602–03 (1944).

Accordingly, courts uniformly reject the contractual labels used by or the subjective intent of the parties as dispositive in wage cases like this one. Courts instead look at the totality of the circumstances guided by a variety of factors to determine the "economic realities" of the working relationship, i.e., whether a worker is an employee or truly in business *for himself*.[5] *See, e.g., McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 241 (4th Cir. 2016) (holding workers to be employees under the FLSA despite their having signed independent

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[5] Courts have adopted various formulations of the economic realities test, but the test generally focuses on six factors: (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; (6) the extent to which the service rendered is an integral part of the alleged employer's business.

contractor agreements: "The dueling depictions serve to remind us that the employee/independent contractor distinction is not a bright line but a spectrum, and that courts must struggle with matters of degree rather than issue categorical pronouncements."); *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016) ("[S]tatus as an employee for purposes of the FLSA depends on the totality of circumstances rather than on any technical label[.]") (internal citations and quotation marks omitted); *Safarian v. Am. DG Energy Inc.*, 622 F. App'x 149, 151 (3d Cir. 2015) ("[T]he [question of misclassification] arises *because* the parties structured the relationship as an independent contractor, but the caselaw counsels that, for purposes of the worker's rights under the FLSA, we must look beyond the structure to the economic realities."); *Chapman v. A.S.U.I. Healthcare & Dev. Ctr.*, 562 F. App'x 182, 184 (5th Cir. 2014); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Imars v. Contractors Mfg. Servs., Inc.*, 165 F.3d 27, 1998 WL 598778 (6th Cir. 1998) (unreported table decision); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) ("[T]he subjective intent of the parties to a labor contract cannot override the economic realities . . . .").

The legal principle eschewing contractual manipulation of the FLSA is sound. The FLSA was designed to address unequal bargaining power between employers and employees and prevent the type of private contracts that could result in

substandard wages or excessive work hours.[6] Allowing such contracts promotes a "race to the bottom," wherein employers who misclassify and fail to properly pay employees can undercut competitors by lowering labor costs.[7] In other words, "[m]isclassification . . . hurts law-abiding employers who play by the rules but are under-bid by their competitors."[8] Under-bidding harms the marketplace and frustrates Congress's intent by preventing any uniform standard of rights. As this Court explained:

> The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts . . . . Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage

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[6] *See* Anna P. Prakash and Brittany B. Skemp, *Beyond the Minimum Wage: How the Fair Labor Standards Act's Broad Social and Economic Protections Support Its Application to Workers Who Earn a Substantial Income*, 30 ABA J. Lab. & Emp. L. 367, 383 (2015).

[7] *Id.*

[8] Nat'l Emp't Law Project (NELP), *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, Fact Sheet (Sept. 2017), *available at* https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.

> requirements, cannot be utilized to deprive employees of their statutory rights.

Barrentine, 450 U.S. at 741 (quoting *Tenn. Coal*, 321 U.S. at 602–03); *accord Imars*, 1998 WL 598778, at *5 ("We agree that it makes very good sense to reject contractual intention as a dispositive consideration in our analysis . . . . This is true even when the bargaining is done at arm's length. The FLSA does not just purport to protect weakly-positioned employees from their employers. It also prevents employers from contracting with more productive employees [ ] to the detriment of less productive ones.") (internal citations and quotation marks omitted).

Against this backdrop, Prime's proposed standard becomes all the more exceptional. Viewing only the face of a contract and the labels therein to determine a worker's status under the FAA would make the FAA stand alone and in sharp contrast to the purpose of the substantive statute underlying this case. Promoting form over substance would create a special and purely facial test for the FAA. It would upend the established understanding of how worker status is determined, create inconsistency and uncertainty for companies and their workers, and, if allowed to bleed into the determination of substantive rights, open the door to the erosion of decades of precedent prohibiting the waiver of employees' rights. In short, calling a worker an "independent contractor" in a contract does not make it so under any of the employment laws canvassed above, and this Court should not make the FAA the sole exception.

CONCLUSION

Where statutory background gives no cause to distinguish between employees and independent contractors, courts do not read in such a distinction. Amici respectfully request that this Court affirm the First Circuit's opinion. But should this Court find that worker status matters under the FAA exemption, the distinction must be drawn in the way courts have universally done across the employment-law spectrum: based on the actual working relationships, not on bare contractual labels.

Respectfully submitted,

John G. Albanese
BERGER & MONTAGUE, P.C.
43 SE Main Street
SUITE 505
Minneapolis, MN 55418
(612) 594–5997
jalbanese@bm.net

Anna P. Prakash
Counsel of Record
NICHOLS KASTER, PLLP
4600 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 256–3200
aprakash@nka.com

APPENDIX

APPENDIX LIST OF AMICI CURIAE

(Institutional affiliations are listed for identification purposes only)

Brad Areheart
Associate Professor of Law
University of Tennessee College of Law
Knoxville, TN

Rick Bales
Professor of Law
Pettit College of Law (visiting at Akron 2018–19)
Ohio Northern University
Ada, OH

Mark Barenberg
Sulzbacher Professor of Law
Director, Columbia Program on Labor Law and Political Economy
Columbia University Law School
New York, NY

Stephen F. Befort
Gray, Plant, Mooty, Mooty, & Bennett Professor of Law
University of Minnesota Law School
Minneapolis, MN

Stephanie Bornstein
Associate Professor of Law
Levin College of Law
University of Florida
Gainesville, FL

Richard R. Carlson
Professor of Law
South Texas College of Law Houston
Houston, TX

Angela B. Cornell
Clinical Professor of Law
Director, Labor Law Clinic
Cornell University Law School
Ithaca, NY

Roberto L. Corrada
Professor and Mulligan Burleson Chair in Modern Learning
Strum College of Law
University of Denver
Denver, CO

Marion Crain
Wiley B. Rutledge Professor of Law
Vice Provost
Washington University School of Law
St. Louis, MO

Kenneth G. Dau-Schmidt
Carr Professor of Labor and Employment Law
Maurer School of Law
Indiana University
Bloomington, IN

Veena Dubal
Associate Professor of Law
University of California, Hastings
San Francisco, CA

Cynthia Estlund
Catherine A. Rein Professor of Law
New York University School of Law
New York, NY

Catherine Fisk
Barbara Nachtrieb Armstrong Professor of Law
University of California, Berkeley Law
Berkeley, CA

Elizabeth Ford
Distinguished Practitioner in Residence
Seattle University School of Law
Seattle, WA

Ruben J. Garcia
Professor of Law
Willian S. Boyd School of Law
University of Nevada, Las Vegas
Las Vegas, NV

Charlotte Garden
Associate Professor of Law
Co-Associate Dean for Research and Faculty Development
Seattle University School of Law
Seattle, WA

Michael Z. Green
Professor of Law
Director, Program in Workplace Law
Texas A&M University School of Law
Fort Worth, TX

Kati Griffith
Associate Professor of Labor and Employment Law
Chair, Department of Labor Relations, Law, and History
School of Industrial and Labor Relations
Cornell University
Ithaca, NY

Ann C. Hodges
Professor of Law Emerita
University of Richmond School of Law
Richmond, VA

Risa L. Lieberwitz
Professor of Labor and Employment Law
School of Industrial and Labor Relations
Cornell University
Ithaca, NY

Ariana R. Levinson
Professor of Law
Louis D. Brandeis School of Law
University of Louisville
Louisville, KY

Martin H. Malin
Professor of Law
Co-Director of the Institute for Law and the Workplace
Chicago-Kent College of Law
Illinois Institute of Technology
Chicago, IL

Marcia L. McCormick
Professor
Associate Dean for Academic Affairs
Saint Louis University School of Law
St. Louis, MO

Scott A. Moss
Professor of Law
Schaden Chair in Experiential Learning
University of Colorado Law School
Boulder, CO

Michael M. Oswalt
Associate Professor of Law
Northern Illinois University College of Law
DeKalb, IL

Sanjukta Paul
Assistant Professor of Law
Wayne State University
Detroit, MI

Brishen Rogers
Associate Professor of Law
Beasley School of Law
Temple University
Philadelphia, PA

César F. Rosado Marzán
Associate Professor of Law
Co-Director of the Institute for Law and the Workplace
Chicago-Kent College of Law
Illinois Institute of Technology
Chicago, IL

Mark Rothstein
Herbert F. Boehl Chair of Law and Medicine
Louis D. Brandeis School of Law
School of Medicine
University of Louisville
Louisville, KY

John E. Rumel
Associate Professor of Law
University of Idaho College of Law
Boise, ID

Paul Secunda
Professor of Law
Director, Labor and Employment Law Program
Marquette University Law School
Milwaukee, WI

Michael Selmi
Samuel Tyler Research Professor of Law
George Washington University Law School
Washington, D.C.

Joseph E. Slater
Eugene N. Balk Professor of Law and Values
Distinguished University Professor
University of Toledo College of Law
Toledo, OH

Kerri L. Stone
Professor of Law
Florida International University College of Law
Miami, FL

Marley S. Weiss
Professor of Law
Francis King Carey School of Law
University of Maryland
Baltimore, MD